

**In the Supreme Court of the United States**

OCTOBER TERM, 1979

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No. 79-770

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

NATIONAL CRUSHED STONE ASSOCIATION, ET AL.

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DOUGLAS M. COSTLE, ADMINISTRATOR,  
ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

CONSOLIDATION COAL COMPANY, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FOURTH CIRCUIT*

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**REPLY BRIEF FOR THE PETITIONERS**

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1. Respondents argue that there is no conflict in the circuits. That assertion simply cannot withstand scrutiny. The Fourth Circuit in the cases presented for review has remanded EPA's BPT variance clauses and has ordered EPA to revise them to include Section 301(c) factors (Pet. App. 29a-35a, 50a-52a). The District of Columbia Circuit, on the other hand, has upheld identical variance clauses in the face of EPA's refusal to include Section 301(c) factors. *Weyerhaeuser Co. v. Costle*, 590 F. 2d 1011, 1036 (1978). There is no way to reconcile those holdings.

2. Respondents further argue that no important question is presented. They state that because the 1977 BPT deadline has passed, most petitions for BPT variances would have been filed by now. Moreover, they say that the Act will in any event require pollution dischargers to meet more stringent limitations (such as BAT) by 1984-1987.

Respondents overlook two points. First, a pollution discharger's BPT compliance costs are not limited to a one-time capital investment for control equipment; the costs of operating and maintaining that equipment over the years can often be substantial. Thus, a discharger now in compliance with BPT may well seek a Section 301(c) variance from BPT in the future if the Fourth Circuit's decisions are allowed to stand. Second, although Section 301(c) allows dischargers to seek relief from BAT on grounds of affordability, the Act, as we construe it, does not authorize limitations less stringent than BPT levels. Yet, under the Fourth Circuit's interpretation, limitations less stringent than BPT levels *would* be permitted. Thus, unless this Court intervenes, the practical effect of the decision below, and the conflict, will continue beyond 1987.

#### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.  
*Solicitor General*

DECEMBER 1979